

Memorandum

495.0130

To: District and Subdistrict Administrators

Date: April 3, 1981

From: Headquarters – Principal Tax Auditor

Subject: Conditional Sale Subject to Sales Tax
Per Section 6006(e)

The responses to my letter of January 8, 1981, requesting feedback from the districts on new or unusual situations uncovered by audit included a sale on approval problem you may encounter. The tax application, approved by our counsel, is explained herein in the interest of uniform administration. Here is how Inglewood District described the situation:

An audit disclosed the following transaction. A \$XX,XXX machine was sold to a New York customer/consumer. An agent (not a carrier) of the New York customer delivered the machine to the University of Illinois for testing after which it was delivered to the New York purchaser for use. Seller claimed the sale as an exempt sale since the sale did not occur until the purchaser “accepted” the property which we acknowledged occurred out-of-state (A/Illinois). Taxpayer cited Regulation 1628, Section (b)(3)(C), Determination of when sale occurs – sale on approval. “When a sale is on approval, the sale does not occur until the purchaser accepts the property.” (Emphasis added)

We responded by stating that our contention is that Section 6006(e) applies: “‘Sale’ means and includes a transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price.” Possession was transferred to an agent of the buyer in this state, a point that is not disputed by the parties.

With regard to the contention that the contract represents a sale on approval, we referred to the Uniform Commercial Code Sections 2-326 and 2-327.

(A) Section 2-326 states, “Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the contract is a ‘sale on approval’ if the goods are delivered primarily for use...”

The contract in question did not conform to that provision. Section 5 on page 3 of the contract provides that the seller warrants the equipment against defects for the first year. This warranty against defects is quite similar to the warranty on most new products sold, and can in no way be construed to provide that the buyer could return the machine for any reason.

(Appears there was a second page, which is missing. SPJ 9/18/01)

M e m o r a n d u m**495.0130**

To: Mr. Glenn Bystrom

Date: July 10, 1996

From: Gary Jugum

Subject: Non-Attorney Opinions

I have reviewed Headquarters – Principal Tax Auditor’s memorandum of April 3, 1981 to District and Subdistrict Administrators.

We are in agreement with his conclusion, as follows:

Conditional Sale v. Sale on Approval. The sale of property which was delivered to the out-of-state buyer’s agent in California who delivered it to an out-of-state university for testing, and then delivered it to the buyer in New York does not qualify for exemption as a “sale on approval” in interstate commerce, merely because the “approval” occurred in New York. Pursuant to Regulation 1628(b)(3)(C), “When a sale is on approval, the sale does not occur until the purchaser accepts the property.” The Uniform Commercial Code, however, sets specific requirements for sale on approval. The recipient must have the unconditional right to return the goods, even if they meet the contract specifications. Any impediment to the exercise of this right prevents the contract from being “on approval”. Examples of such impediments would be requiring the buyer to make payment upon signing of the contract; retention of title by the seller until final payment is made, rather than upon approval; making the right to return the goods conditional upon failure to conform to the contract; and requiring the recipient to accept risk of loss. If these or other impediments prevent the contract from being “on approval”, the sale is a conditional sale as described in section 6006(e). 4/3/81

Gary Jugum By MB
